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ABSTRACT

This statement paper presents the Department of Justice views on S.2568, the "Civil Rights Act of 1984." It begins with an affirmation of the administration's equal resistance to discrimination and intrusive expansion of Federal power, but asserts that recent legislation has created unnecessary conflict between these objectives. The paper then argues that the Supreme Court's decision in "Grove City College v. Bell," which held Title IX of the Education Amendments of 1972 to be program-specific in its coverage, was correct. There then follows an explanation of why the wording of S.2568, which was conceived as an attempt to broaden Title IX's coverage, is poorly drafted. It is argued (1) that the term "recipient," as used in the bill, is open to the broadest possible interpretation, (2) that the bill would expand coverage without adequately explaining how the statutes are to be enforced, and (3) that S.2568, as worded, would create serious administrative complexities for Federal agencies that are already over-burdened with paperwork. It is also held that enforcement, implementation, and probable litigation costs would be staggering to the Federal government. (KH)

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Department of Justice

JUN 18 1984

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTION
UNITED STATES SENATE

CONCERNING

S. 2568 - "CIVIL RIGHTS ACT OF 1984"

ON

JUNE 5, 1984

U.S. DEPARTMENT OF EDUCATION
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Mr. Chairman and Members of the Subcommittee, I welcome this opportunity to appear before you today to present the views of the Department of Justice on S.2568, the "Civil Rights Act of 1984."

Introductory Remarks

Let me preface my remarks on the proposed legislation by stating first my personal intolerance -- and the abiding intolerance of the President, the Vice-President, the Attorney General and every other member of this Administration -- of discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion or age. The nondiscrimination principle -- embodied in the ideal of a Nation blind to color and gender differences -- is at the center of America's historic struggle for civil rights. In that tradition, ours has been a profound and unwavering commitment to insure every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer -- no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth. And, whenever that legal and moral command has been compromised by discrimination -- whether for reasons regarded as benign or pernicious -- the Administration has been quick to bring the full force of the law against the discriminator.

There is another principle that this Administration has been every bit as vigilant in protecting, the principle of Federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom. We have, therefore, resisted unnecessary and overly intrusive expansion of federal power, particularly when the federal intrusion unduly impedes state and local governments' efforts to deal effectively with regional and local problems that most directly affect citizenry at the state and local levels.

As Senator Hatch noted in his statement regarding S.2568, the bill being considered by the Committee, as currently drafted, poses a tension -- in my view, an unnecessary tension -- between these two important principles of equal opportunity and limited federal involvement in state and local affairs. That, in itself, is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes, bring into focus the tension I have mentioned.

Heretofore, however, Congress has undertaken -- through thorough and extensive deliberations, comprehensive hearings,

open and rigorous floor debate, and the amendment process -- to insure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the need (based on congressional findings) for strong Federal protections against discrimination (i.e., the Voting Rights Act of 1965), but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives (i.e., the Revenue Sharing Act of 1972).

We join with Senator Hatch and others in urging Congress to put "The Civil Rights Act of 1984" (S.2568) through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate (in Committees and on the floor of the House and Senate) that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short-circuited.

The Grove City Decision

S.2568 has been offered as a modest amendment of existing statutes, intended not to break new ground, but only to overturn the Supreme Court's recent decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), to the limited extent that the Court held Title IX of the Education Amendments of 1972 to be program-specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education "program or activity" receiving Federal financial assistance. The Supreme Court in Grove City ruled that a college which enrolled students receiving Basic Educational Opportunity Grants ("Pell Grants") was subject to Title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college -- in this instance, the student aid program.

Much has been said since Grove City about the Court's so-called "new interpretation" of Title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of Title IX as program-specific legislation altered the state of the law.

Simply to set the record straight, I would point out that the Court's "programmatic" reading of Title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute -- one contemplating institution-wide coverage of Title IX -- the fact is that, before Grove City, every court of appeals except the Third Circuit in the Grove City case itself had construed Title IX to be program-specific in coverage. 1/ Indeed, as to the parallel Federal

1/ E.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated and remanded,

(cont'd)

funding statutes dealing with race discrimination (Title VI of the Civil Rights Act of 1964) 2/ and with handicap discrimination (Section 504 of the Rehabilitation Act of 1973), 3/ they, too, had consistently been interpreted by the Federal appellate courts as program-specific. Thus, testimony provided to this Committee regarding, for example, the dramatic strides made by women in college athletics since Title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in Grove City simply directed the Third Circuit court of appeals -- which alone among federal appellate courts had construed Title IX to have institution-wide coverage -- to get in line with existing judicial authority in this area, including earlier Supreme Court precedent. 4/

1/ (cont'd)
52 U.S.L.W. 3700 (U.S. March 26, 1984) in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1982), aff'd 699 F.2d 309 (6th Cir. 1983).

2/ E.g., Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

3/ E.g., Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980). See also Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984).

4/ North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

Nonetheless, we agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to Title IX that will change its programmatic coverage to institution-wide coverage. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the Grove City decision. Nor would it be inappropriate, in my view -- if Congress should find the need for it in these or other hearings -- to broaden in similar fashion coverage of the parallel antidiscrimination funding statutes that deal with race, handicap and age. That is, as I understand it, precisely what Congress has in mind. Based on that assumption, let me make it unmistakably clear: the Administration's concern with S.2568 lies not with the stated purpose of its sponsors, but only with the overly expansive language selected to reach the desired end. In the name of doing no more than "restoring" Title IX to institution-wide coverage, and providing a similar interpretation to three parallel statutes, the Senate has introduced a bill in S 2568 (like its counterpart in the House, H.R. 5490) that, by its terms, goes far beyond the limit set for it by its sponsors. Let me explain.

The Approach of S.2568

S.2568 would amend not only Title IX, but also three

other civil rights statutes prohibiting discrimination in federally-funded programs: Title VI of the Civil Rights Act of 1964 (race discrimination); Section 504 of the Rehabilitation Act of 1973 (handicap discrimination); and the Age Discrimination Act of 1975 (age discrimination). We are told that the bill's aim is only to remove the programmatic limitation on coverage found in the current statutory phrase "program or activity" so as to make clear that coverage has an institution-wide application. The difficulty is that the vehicle used to accomplish this purpose is an overly expansive definition of "recipient" that takes civil rights enforcement not only well beyond the institutional horizons some have set for Title IX and the other statutes, but indeed into entirely new areas of responsibility, and without any guidance.

1. Definition of "Recipient." by deleting the phrase "program or activity" from the existing statutes and substituting in its place the word "recipient," S.2568 prohibits discrimination under the four statutes "by any recipient of" Federal financial assistance, rather than barring only discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of "recipient" that is said to be "drawn from" existing federal regulatory definitions of that term under Title VI, Title IX and Section

504. There are, however, notable differences. A "recipient," as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities;" by contrast, under S.2568, a "recipient" is to be covered in its entirety. Beyond that, the bill's definition of "recipient" does not track any of the present regulatory definitions, but makes additions and deletions that expand the scope of coverage. Thus there is added at the end the new clause: "or which receives support from the extension of federal financial assistance to any of its subunits;" while the regulatory exemption for "ultimate beneficiaries" has been deleted. As presently proposed, the bill's definition, in its entirety reads:

> the term 'recipient' means --
>
> (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thererof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

There is, admittedly, ample room for debate as to the exact breadth of this language. No definition of "receives support" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have left unclear the true legislative intent.

At a minimum, it seems that the term "recipient" is at least broad enough to insure coverage of an educational institution where federal funds are provided to one or more of its programs or activities, and thus the Supreme Court's programmatic interpretation of Title IX in Grove City would be overturned. It appears, moreover, that the definition of recipient would also reach all campuses of a multi-campus university (i.e., University of California) if any federal funds went to just one campus, or to students (through a Pell Grant) enrolled at only one college campus. Also, federal funds going to an undergraduate program would, under S.2568, seemingly include all graduate programs within Title IX coverage, even though there was no federal financial assistance at the graduate level.

To suggest a narrower reading of the language on the ground suggested by David Tatel (Tatel Test. at p.7) -- i.e., that the bill is designed only to "restore" Title IX coverage to pre-Grove City interpretations and those interpretations

never went so far -- is to ignore that S.2568 is a different statute using different language under different circumstances. Small comfort can therefore be derived from past agency interpretations of a markedly different piece of legislation. The scope of the present bill will unquestionably be determined by its language and legislative history, not pre-Grove City activities. And that is why it behooves Congress to insist that the language of the bill accurately reflects the bill's purpose. Otherwise the Supreme Court will once again -- as it did in Grove City -- be forced to tell Congress that the law it passed fails to do what Congress intended for it.

What, for example, is the intended scope of coverage under S.2568 with respect to a college or university's commercial property? Rental property occupied by students or faculty would seem to be covered. But, also within reach of the broad recipient definition could well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the non-educational enterprise "receives support" from the college or university that is in some aspect extended Federal financial assistance. Such an interpretation not only brings into play

Title IX, but also Title VI, the Age Discrimination Act, and Section 504. Thus, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under S.2568, apparently apply to the non-educational ventures of a university as well as to those associated with its educational activities.

Nor does that necessarily define the outer limits of coverage. As S.2568 is written, when Federal financial assistance is extended to a "subunit" (not defined) of a larger "entity" (not defined), the larger entity itself -- whether it be public or private -- can be viewed as the "recipient" if it is deemed to have "receive[d] support from" (not defined) the federal funds going to the subunit. While Senator Dole and others have testified that this language is intended only as a "limited exception," other witnesses seem to regard it sufficient to meet the "receives support" standard if the Federal financial assistance to a subunit "frees up" non-federal funds to be used elsewhere (Tatel Test., at p.15). Courts thus could conclude on such a theory that if a federal agency extends federal assistance to a State university system, all other State departments or agencies -- whether or not they are educational or perform an education service -- would be brought within the coverage of the four statutes since the State "receives support" from the

Federal assistance to the university system. The clear contemplation appears to be that Federal agencies will be able to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

For example, if a county water department receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, S.2568 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the federal financial assistance can be said to give "support" to the county. Should EPA receive a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- e.g., the county's road maintenance -- under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation).

In addition, under the proposed definition of "recipient" if the large entity receives Federal financial assistance, all subunits are swept within the coverage provisions -- whether funded or not and whether or not they "receive support" from the funding.

Thus, a federal block grant to the State for educational purposes would likely bring all political subdivisions of the State under the civil rights oversight responsibilities of the Federal government. Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under S.2568 seems to be virtually complete. And, the bill would apply in similar fashion and with equal force to private commercial ventures and enterprises.

Moreover, all successors and assignees or transferees of a "recipient" become, under S.2568, recipients in their own right; as does any entity to which federal funds are extended ". . . through another entity or a person" (emphasis added). Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate.

While Senator Dole and others have testified that this is not the intent, the bill's language simply fails to preclude so broad a reading. It may well be that individuals receiving federal funds escape coverage, but, as I have already indicated, the express protection against coverage afforded by the existing regulations to "ultimate beneficiaries" of federal aid (28 C.F.R. §§ 41.3(d), 42.102(f)) -- such as farms, for example, under certain Department of Agriculture grants -- was not carried over in the statutory definition of "recipient." Thus, the bill is in fact susceptible to the broadest possible interpretation.

2. Enforcement Provisions. In addition to expanding the substantive coverage of the nondiscrimination funding statutes, S.2568 also substantially alters -- albeit again without any degree of clarity or precision -- the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes: Federal agencies would enforce either by fund termination by the particular Federal funding agency or by referral to the Department of Justice for litigation ("any other means authorized by law"); private parties would continue to have a private right of action. The scope of these enforcement mechanisms is measurably expanded, however.

As to the fund termination provisions, S.2568 replaces the current "pinpoint" language -- which limits fund termination to the particular program that has been discriminatorily conducted -- with new language providing for termination of "the particular assistance which supports" the discrimination (emphasis added). The ambiguity introduced by the "supports" phrase opens the way for a possible interpretation of the four statutes that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the federal funds going to it provide "support" for another nonfunded program involved in unlawful discrimination. The new termination provision also admits of the argument that any federal assistance which goes to the entity as a whole necessarily "supports" the discrimination of the component parts and is thus invariably vulnerable to fund cutoff.

This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation

appear to be consistent with the overall context of the "supports" phrase in the bill itself, the focus of which is ostensibly on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Nevertheless, the bill does not specify in what respect a federal grant to one entity could be deemed to "support" discrimination committed by related entities and consequently implicate the vicarious termination requirement.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes unambiguously requires the more modest fund termination remedy and there would appear to be no good reason to alter this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by S.2568. Unlike the existing statutes -- where the Federal government's authority to proceed in court (and a private litigant's jurisdiction in court) is no more extensive than its authority to proceed in fund termination proceedings (North Haven Board of Education v. Bell, supra, note 4) -- S.2568 disregards this limitation, providing broader judicial enforcement capabilities than are available administratively. If a federal agency seeks to enforce through fund

termination, it can, at most, under S.2568, reach only those practices that are supported by federal funds. Yet, on referral of the same matter to the Department of Justice for litigation (or if a private litigant is in court by way of private right of action), the bill contemplates that all the activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court -- even when there is no conceivable link between the violation and the federally funded activity. Thus, the Department of Justice (and private litigants) can seek to enjoin activity that plainly would not be subject to fund cutoff by the funding agency. The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress whether so open-ended an invitation to private attorneys to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impede civil rights enforcement, as so expanded by S.2568.

3. Administrative Concerns. Nor can one overlook the serious administrative complexities that S.2568 presents to the Federal agencies. Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. S.2568,

which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all the programs, activities, and subunits of a recipient, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and impose regulatory requirements.

The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews as well as multiple reporting and other regulatory requirements. Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as

investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities by the drafters of S.2568.

Nor has attention been paid to twenty-six Federal statutes that make specific reference to Title VI, Title IX, Section 504, or the Age Discrimination Act. Several of these statutes, including the Revenue Sharing Act and the block grants contained in the Omnibus Budget Reconciliation Act, have broad impact. The drafters of S.2568 have not indicated what effect passage of S.2568 will have on the implementation of these program-specific statutes.

Closing Remarks

The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted. If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age and handicap, such a legislative undertaking should be carefully considered, fully debated, and cautiously constructed. There is, at present, nowhere near the Federal involvement in State and local affairs that will be required under S.2568. Nor

can it honestly be maintained that legislation designed to overturn Grove City by making Title IX coverage -- even if expanded to include race, age and handicap -- institution-wide warrants such intrusive Federal activity.

While Congress may well conclude that such legislation is in the Nation's best interest, it should do so fully cognizant (1) that the additional costs of Federal enforcement under a bill as comprehensive as S.2568 can be staggering; (2) that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely expanded; (3) that the paperwork requirements can only increase (and probably dramatically); (4) that with new legislation so dramatically different from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years; and (5) that whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of federal funds to states so that, as "recipients," states "can knowingly decide whether or not to accept those funds" as so conditioned. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

The Department of Justice's review of the foreseeable effects of S.2568 convinces us that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the Grove City decision -- broader, indeed, than extending institution-wide coverage under Title IX to race, age and handicap discrimination as well. The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies and courts. At worst they may include unwarranted interference with important state prerogatives and even lead to adverse judicial decisions as to their enforceability.

It is therefore important to tailor S. 2568 to its stated purpose and to carefully craft the proposed bill with full attention to the complexities of the undertaking. This can be achieved, in the Justice Department's view, with some modification of the proposed definition of "recipient" and a return of the "pinpoint" provision (i.e., the fund cutoff provision) to its pre-Grove City status.

In addition, the Committee might want to consider using the approach to coverage for state and local governments that was adopted by Congress in the civil rights provisions of the Revenue Sharing Act. The federal funds under that statute go to municipalities without being earmarked for particular use. A presumption attaches that the federal financial assistance is provided to all municipal programs and activities unless the city can show, by clear and convincing evidence, that a particular department or service received no federal funds. If a similar rebuttable presumption existed under S.2568 for State and local funding, the bill's coverage, while still generally applicable to states and localities, would be far more manageable as an enforcement matter.

The Department of Justice stands ready to work with the Committee on these and other modifications of S.2568 so as to align the bill more closely with the stated objectives of its sponsors. It is critically important that legislation of this sort be drafted in precise, clear terms that leave no room for speculation as to its reach and application.

Thank you. I will be happy to answer any questions.

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